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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability

Report of the United Nations High Commissioner for Human Rights

Summary

This report provides analysis and clarification of the relationship between human rights due diligence, as described in the United Nations Guiding Principles on Business and Human Rights, and determinations of corporate liability. It is informed by discussions held during a 2017 consultation convened pursuant to Human Rights Council resolution 32/10 and forms part of the continuation of the work of the Office of the United Nations High Commissioner for Human Rights in the area of accountability and remedy, as also requested by the Human Rights Council in resolution 32/10.

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I. Introduction

1. Ensuring access to effective remedy for those whose human rights have been adversely impacted by business activities is one of the three Pillars of the United Nations Guiding Principles on Business and Human Rights (UNGPs). In 2014, the Office of the United Nations High Commissioner for Human Rights (OHCHR) launched an initiative, called the Accountability and Remedy Project Part I, aimed at strengthening implementation by States of the third Pillar, specifically with respect to judicial mechanisms. In resolution 26/22 (2014), the Human Rights Council (HRC) requested the High Commissioner to continue his work on this issue and to submit a final report to the Council at its thirty-second session.

2. In June 2016, OHCHR submitted its report to the HRC pursuant to resolution 26/22.[1] The report recognized the urgent need for action by States to ensure that victims of human rights harms connected to business activities have access to effective remedy. The report affirmed the statement from the UNGPs that effective judicial mechanisms are at the core of ensuring access to remedy,[2] while noting that other mechanisms, such as State-based non-judicial mechanisms, should complement judicial remedies.[3]

3. The report offered a set of practical resources which States can draw upon with a view to progressively and systematically improving their implementation of Pillar III, including (i) a model terms of reference for review of the effectiveness of domestic legal systems, (ii) an annex setting out a list of practical steps for States to consider, arranged by themes ("policy objectives") relating to both procedural and substantive aspects of access to remedy, and (iii) an addendum explaining key legal concepts and the main findings emerging from the work in further detail.[4]

4. The HRC, in its resolution 32/10, welcomed OHCHR's work on improving accountability and access to remedy for victims of business-related human rights abuse, noted with appreciation the report, and requested the High Commissioner "to continue his work in this area and to convene two [multi-stakeholder] consultations" following up on the recommendations of the Accountability and Remedy Project Part I.[5]

5. The first consultation focused on a technical issue emerging from the Accountability and Remedy Project research and consultations which has potentially significant implications for the effectiveness of corporate liability regimes relevant to business respect for human rights. The research had identified a need for greater clarity about the different ways in which the exercise of human rights due diligence and corporate legal liability may interrelate, and how to ensure greater policy coherence from States in their approaches to access to remedy and human rights due diligence.[6] Specifically, the report submitted to the HRC recommended that "[t]he principles for assessing corporate liability under domestic public [and private] law regimes [be] properly aligned with the responsibility of companies to exercise human rights due diligence across their operations."[7]

6. The multi-stakeholder consultation was convened at the *Palais des Nations* in October 2017 and was attended by over 60 experts representing States, intergovernmental organizations, national human rights institutions, non-governmental organizations, business, legal practitioners, and academia. The various substantial, procedural, and practical issues discussed are set out further below in sections following the structure of the consultation,[8] followed by concluding remarks on how to further enhance the understanding

[1] A/HRC/32/19; A/HRC/32/19/Add.1.

[2] UN Guiding Principle 26 and Commentary.

[3] *See* UN Guiding Principle 27 and Commentary.

[4] The OHCHR also released a paper providing illustrative examples of what was said in the report.

[5] A/HRC/RES/32/10, para. 13.

[6] *See, e.g.*, A/HRC/32/19/Add.1, paras. 21-23, 55-56.

[7] A/HRC/32/19, Annex, Policy Objectives 3, 14. Annex I of this report reproduces these policy objectives along with their supporting elements.

[8] Annex II of this report contains the agenda of the consultation. The concept note for the meeting is available at http://www.ohchr.org/Documents/Issues/Business/HRDDConsultationConceptNote.pdf.

of the findings contained in the Accountability and Remedy Project report submitted to the HRC in 2016.

II. Deconstructing human rights due diligence and its relationship to corporate liability

7. Human rights due diligence, as described in the UNGPs, refers to the processes and activities by which businesses identify, prevent, mitigate, and account for how they address their adverse human rights impacts.[9] The identification, prevention, and mitigation of adverse human rights impacts, as well as the communication of the effectiveness of these efforts externally, are integral to meeting the corporate responsibility to respect human rights. The UNGPs provide important guidance as to the key elements of human rights due diligence and the basic standards that should be observed.

8. Human rights due diligence should not be confused with other forms of legal due diligence activities, such as those carried out in preparation for corporate mergers and acquisitions, or those required for compliance monitoring purposes in areas such as banking or anti-corruption. The key difference between these concepts is that the latter group is generally concerned with identifying, preventing, and mitigating risks to *business*; whereas human rights due diligence is concerned with risks to *people*, specifically from adverse human rights impacts that a business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships. As such, human rights due diligence demands methodologies that are informed, in scope and procedural terms, by internationally recognized human rights standards, and should "[i]nvolve meaningful consultation with potentially affected groups and other relevant stakeholders."[10]

9. The corporate responsibility to respect human rights exists over and above compliance with national laws and regulations protecting human rights.[11] Business enterprises should therefore not wait for legal regimes on human rights due diligence to emerge before establishing and developing their own human rights due diligence processes, nor should they consider that mere compliance with legal requirements on human rights due diligence will necessarily be consistent with their responsibility to respect human rights. As stated in the Commentary to the UNGPs, "[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions."[12]

10. However, the relationship between human rights due diligence and the law does not end there. Despite the conceptual distinction between the corporate responsibility to respect human rights on the one hand, and questions of legal liability on the other, many companies recognize the importance of human rights due diligence from a legal risk management perspective. The Commentary to the UNGPs notes that "conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[13]

11. Understanding these linkages between human rights due diligence and legal liability (and particularly the way that different legal rules and conditions can influence the extent to which, and the standards to which, companies are compelled or encouraged to carry out human rights due diligence) can offer insights into different ways to strengthen domestic legal regimes from a business and human rights perspective. Although the corporate

[9] UN Guiding Principles 17-21 and Commentary.
[10] UN Guiding Principle 18.
[11] UN Guiding Principle 11, Commentary.
[12] UN Guiding Principle 12, Commentary.
[13] UN Guiding Principle 17, Commentary.

responsibility to respect is not of itself a legal standard, supporting and guiding human rights respecting behavior by companies, and enforcing legal standards where necessary, are key elements of the State's duty to protect.

12. These linkages will vary depending on the nature and aims of the regime in question. For instance, domestic regulatory regimes can be designed such that human rights due diligence is itself a legal standard of behavior. Under such a regime (which declares certain human rights due diligence activities to be mandatory), non-observance of human rights due diligence raises the prospect of legal liability, regardless of whether, or the extent to which, damage flows from that non-compliance. However, in other contexts the question of whether human rights due diligence was performed may be one of several threshold factual issues (e.g., in an assessment as to whether a duty of care was breached in a negligence case, where liability will ultimately hinge on whether this breach of duty was the cause of actual harm). In other cases, such as in a prosecution of a wrongful act for which there is strict liability, the fact that a company has conducted human rights due diligence will not have a bearing on whether the company is *prima facie* liable, but it may raise the possibility of a legal defense. In a criminal context, such as a case where corporate complicity is alleged, evidence of human rights due diligence could be relevant to whether the corporation had the requisite *mens rea* or "state of mind" to commit the offense.

13. The various ways in which non-observance of human rights due diligence can be material to legal liability in different contexts highlight the range of options available to States when it comes to embedding human rights concepts in legal regimes. States may adopt a combination of approaches to support, encourage, and compel the observance of human rights due diligence. However, these approaches need to be informed by clear policy aims, as well as a thorough understanding of the linkages involved. A key goal from the outset must be the encouragement of *meaningful* human rights due diligence by companies in the spirit of the UNGPs. Simple, compliance-focused "check box" approaches to human rights due diligence, whereby a company engages in procedural steps without meaningfully focusing on outcomes, would not meet this standard. A closer look at the different ways in which human rights due diligence and legal liability interrelate will demonstrate how States can help ensure meaningful diligence by business.

III. Domestic legal regimes requiring human rights due diligence as a standard of conduct

14. States could adopt laws that require companies to carry out human rights due diligence activities or else face legal liability. Several such laws have been passed, although most often with respect to assessing actual and potential adverse human rights impacts through reporting and disclosure obligations. More recent legislation and proposed laws have gone further, requiring companies to integrate and act upon those findings, track responses, and communicate how impacts are addressed.

15. Numerous factors need to be considered when legislators decide the scope of these laws, such as what types of companies will be bound, which business relationships must be accounted for, the harms that must materialize to trigger a company's liability, the penalties for non-compliance, and the methods of enforcement.

Case Study 1

Under the French duty of vigilance law, French companies with at least 5,000 employees in France, or 10,000 employees throughout the corporate group, must publish an effective vigilance plan detailing measures for risk identification and for the prevention of severe violations of human rights resulting directly or indirectly from their operations, as well as the operations from companies they control, and certain subcontractors and suppliers.[14] The vigilance plan must also be implemented; thus, companies must regularly assess risks, take

[14] LOI n° 2017-399 du 27 mars 2017.

action to mitigate risks or prevent serious violations, create an alert mechanism to identify risks, and have a monitoring scheme to follow up on the efficiency of implementation measures. Interested parties may enjoin companies to implement the plan and may sue if certain harms occur that could have been avoided if the companies had an effective vigilance plan in place.

Case Study 2

In Switzerland, a Responsible Business Initiative and related parliamentary initiative have been proposed that would require companies that have their registered office, central administration, or principal place of business in Switzerland to exercise due diligence to identify, prevent, cease, and account for violations of human rights and environmental standards in their own operations as well as companies they control.[15] The proposed law would make companies liable for damage caused by any company under their control, even for actions abroad, that could have been prevented had there been human rights due diligence.

16. Such laws can give companies clarity with respect to the human rights due diligence activities they are required to perform. This could help create a level playing field for companies, give human rights due diligence clear legal force, educate stakeholders and the wider public about company activities, and ultimately reduce risks of adverse human rights impacts from occurring.

17. At the same time, States should be careful to guard against unintended consequences of legal interventions. Participants at the Geneva meeting discussed possible disadvantages of "over-regulation;" for instance, the possibility that overly detailed and proscriptive legal regimes could discourage innovation and proactive behavior by companies and encourage narrow, compliance-oriented, "check box" human rights due diligence processes. On the other hand, too much flexibility may not provide sufficient levels of legal certainty for companies (especially if criminal sanctions are to be applied) and could make the regime difficult to enforce.

18. This balance can be difficult to strike in practice, and States should give careful thought to the policy aims of legislation when reconciling these competing considerations.

IV. Human rights due diligence and claims of negligence

19. The concept of negligence is a basis for corporate liability in many jurisdictions, and the extent to which a company conducts human rights due diligence can be relevant when determining whether it negligently caused or contributed to harm. While tests of negligence vary from jurisdiction to jurisdiction and from context to context, they frequently include the following elements: (1) the existence of a legal duty of care towards an affected person (i.e., a legal obligation to act in such a way that others are not harmed by one's actions or, in some cases, omissions), (2) a breach of the applicable standard of care by the defendant, and (3) a resulting injury to the affected person (4) caused by the breach.

20. Whether an entity owes a legal duty of care towards an affected person depends on the facts of each case, in particular the relationship between all of the different actors involved. Domestic tests differ, although factors such as (1) whether a harm was reasonably foreseeable and (2) whether there was sufficient proximity between the parties (i.e., such that imposing a duty of care on a defendant would not be unjust) are often relevant to whether a legal duty of care may be said to exist.

[15] *See* http://konzern-initiative.ch/wp-content/uploads/2017/11/The-initiative-text-with-explanations.pdf.

21. The appropriate standard of care in a claim of negligence is a question regarding what conduct was reasonable given the circumstances. It is a flexible standard that takes into account numerous factors, including the foreseeability, severity, and likelihood of harm; the relationship between the defendant and the affected person(s); and the extent to which the defendant could, and did, prevent or mitigate the harm.

22. Although many companies appear to view human rights due diligence as relevant to their management of litigation risks,[16] there is little evidence as yet that the consensus position reflected in the UNGPs (as regards the corporate responsibility to respect in general and the basic elements of human rights due diligence in particular) is having an impact on judicial decision-making about the nature and scope of corporate duties and standards of care in cases where businesses are alleged to have caused or contributed to adverse human rights impacts. There are few instances of the UNGPs being referred to directly in court judgments.[17]

23. Participants of the Geneva meeting discussed the benefits of the flexibility inherent in the common law system. It was noted that this case-by-case method of legal development provides judges with a certain amount of flexibility to respond to contemporary policy demands and societal expectations. Decisions as to whether there is a duty of care in the circumstances,[18] and the nature and content of the applicable standard of care, are heavily influenced by policy considerations in practice, and common law judges can and do draw from a wide range of policy sources to help inform their work. Embedding human rights due diligence concepts in this context requires judges to be familiar with the elements of human rights due diligence, as described in the UNGPs, and, moreover, to appreciate the value of human rights due diligence as a risk management process, and hence its relevance to the question of whether a standard of care has been met in the circumstances. In addition, judges need access to the technical expertise necessary to enable them to make a realistic assessment as to whether human rights due diligence steps taken by a company were sufficient in the circumstances and, if not, whether the failings of the company concerned were the cause of the harm suffered.

24. These practical considerations are also relevant to civil or "codified" systems of law. There may be greater potential in civil systems (compared to common law systems) to incorporate direct references to the UNGPs in legal frameworks relevant to corporate negligence cases. However, the demands for technical support and awareness-raising among members of the judiciary as to the fundamentals of human rights due diligence and their relevance in corporate negligence cases are likely to be similar.

V. Human rights due diligence as a possible defense to liability

25. While not appropriate in all cases, the exercise of human rights due diligence could be a basis for a possible defense to liability. The equitability and rights-compatibility of permitting such a defense will depend on many factors, including what kind of harm was involved, the connection of a company to the harm, victims' alternative avenues to remedy, and the State's regulatory aims.

26. In some instances, policy justifications counsel the use of strict liability, which shifts the burden of proof onto a company to prove that it should not be held liable for some harmful act.[19] By definition, strict liability offenses permit defenses. In contrast, absolute

[16] *See, e.g.*, Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. HUM. RTS. J. 195, 201 (2017).

[17] Although some decisions in Canadian courts have made tangential references to the UNGPs. *E.g.*, *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856; *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.

[18] For instance, the extent to which there may be a duty of care on the part of a parent company towards those affected by the business activities of a subsidiary. For a UK decision on this point see *Chandler v. Cape plc.*, [2012] EWCA Civ 525.

[19] Strict liability has to do with the presumed liability of a direct perpetrator for engaging in certain prohibited conduct, regardless of the intentions of the actor. This is not to be confused with the issue of how such liability is to be distributed amongst a corporate group. For instance, whether a parent

liability offenses automatically lead to the liability of the responsible party. While the use of strict and absolute liability provides incentives to companies to exercise due diligence activities to avoid liability, allowing a strict liability defense based upon human rights due diligence in appropriate cases can potentially ensure even higher levels of vigilance.

27. There are legal contexts in which a defense to corporate liability exists for having met a defined due diligence standard.

Case Study 3

In the field of bribery, the UK Bribery Act 2010 created a strict liability offense for companies for failing to prevent bribery; however, the Act gives companies a defense if they can show that they had in place "adequate procedures" designed to prevent such conduct.[20] Thus, companies are encouraged to have due diligence processes in place to prevent violations from occurring. If a company can show it had done everything in its power to make sure associated persons did not engage in bribery, it could avoid punishment even if bribery occurred by someone; however, that person can still be found liable under other provisions of the Act.

28. Allowing a defense based on the exercise of some form of due diligence can be extended to the human rights field as well.

Case Study 4

The Swiss initiative referenced above establishes a company's liability for damage caused by companies under its control but provides a full defense under that provision if the company can prove that it took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.[21] As with the Bribery Act, the initiative creates a presumption of liability as well as a defense to displace the presumption, and the direct perpetrator of the harm can still be found liable.

29. Permitting a defense to liability based upon human rights due diligence activities could incentivize companies to meaningfully engage in such activities and have important preventative effects; however, there are serious concerns with the appropriateness of a human rights due diligence defense in some cases. Participants in the Geneva meeting expressed concern that such a defense might not be fair to victims in some cases. In particular, the participants drew attention to the inappropriateness and unfairness of business enterprises seeking to raise due diligence defenses in cases where superficial "check box" approaches to human rights due diligence might be used as a reference point instead of genuine attempts to identify, mitigate, and address human rights risks as contemplated in the UNGPs. The discussion highlighted the importance of ensuring that judges are familiar with the content of the UNGPs as it relates to human rights due diligence so they can distinguish genuine efforts by business enterprises to identify and address risks from superficial efforts, and make their decisions accordingly.

VI. Human rights due diligence and secondary liability

30. A company's exercise of human rights due diligence will also be relevant to claims based on secondary liability. Secondary liability or "complicity" may arise when a business enterprise contributes to adverse human rights impacts caused by other parties. Tests for

company should be held automatically liable for the actions of a subsidiary is a distinct question from whether the subsidiary should be presumed to be directly liable for committing a strict liability offense.

[20] Bribery Act 2010, § 7.

[21] *See* http://konzern-initiative.ch/wp-content/uploads/2017/11/The-initiative-text-with-explanations.pdf.

such liability vary between jurisdictions with respect to the degree of culpability needed (e.g., intentional, knowing, reckless, or negligent assistance) and the degree of contribution needed (e.g., material or substantial assistance) to give rise to legal liability.[22]

31. Conducting human rights due diligence should help companies reduce the risk of legal liability based on theories of complicity by showing that they took every reasonable step to avoid involvement with or contribution to alleged human rights abuse. However, it can be challenging to design secondary liability regimes in such a way so that companies realize that carrying out human rights due diligence with respect to the activities of their business partners is in their best interest (e.g., with regards to legal, reputational, and commercial risks). For instance, secondary liability tests based on "knowledge" may create incentives for companies to not thoroughly investigate sources of human rights risk. To avoid such perverse incentives, legal regimes can use objective standards of proof and principles of "willful blindness," whereby defendants cannot claim ignorance of circumstances where the relevant knowledge would have been relatively easy to obtain.[23] Such concepts will encourage companies to conduct human rights due diligence since not knowing the adverse human rights impacts with which companies may be involved as a result of their business relationships would increase legal risk and be an unreliable defense.[24]

VII. The role of human rights due diligence in determinations of sanctions and remedies

32. In addition to being relevant to whether a company should be liable under a range of theories, human rights due diligence can also be relevant for determining the type and severity of sanctions and remedies once liability is established. Judges often have a considerable amount of discretion and can increase or reduce sanctions and remedies depending on the level of culpability of the company.[25]

33. The fact that a company approaches human rights due diligence seriously and thoroughly can be raised in mitigation. This will not always be relevant (e.g., where the remedy sought is intended to be entirely compensatory), but it will be relevant in criminal sanctioning as well as civil cases where punitive damages are part of the remedy package.[26] Indeed, some States decrease the amount of punishment if a company has engaged in human rights due diligence activities.

Case Study 5

The United States Sentencing Commission Guidelines provide that one of the two factors that mitigate the ultimate punishment of an organization is the existence of an *effective* compliance and ethics program. In order to have a mitigated punishment, companies must "(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[27]

[22] *See* Illustrative examples, 2.1, 13.1; A/HRC/32/19/Add.1, paras. 18-20, 51-54.
[23] *See* Illustrative examples, 3.1, 14.1.
[24] *See* A/HRC/11/13, paras. 80-84.
[25] *See* A/HRC/32/19, Annex, Policy Objectives 11.2, 19.2.
[26] *See* Illustrative examples, 3.1, 11.2.
[27] USSG Ch.8, §8B2.1.

Case Study 6

Under Italian Legislative Decree 231/2001, companies can receive a reduction of pecuniary sanctions if, before any trial starts, they fully compensate any damage, and adopt and implement an organizational model suitable to prevent similar crimes from occurring again.[28]

34. If a company fails to exercise human rights due diligence, a court could mandate such activities as part of a sanction or remedy, or as part of a plea agreement. A potential challenge for States is to ensure that these activities are properly implemented.[29] In some anti-bribery enforcement actions, compliance monitors are used to ensure companies are making appropriate efforts to prevent repetition. This could be transposed to the human rights space as well. Lessons could be drawn from the practice of national contact points set up under the OECD Guidelines on Multinational Enterprises, as well as the Bangladesh Accord Complaints Mechanism, both of which have means to follow up when human rights due diligence activities have been recommended or imposed as part of the outcomes of their respective processes.

VIII. Reaching out to practitioners, policymakers, and civil society regarding the role of human rights due diligence in determinations of corporate liability and attendant penalties

35. The final sessions of the consultation moved the discussion on from the content of domestic law regimes to questions concerning education and outreach; specifically the steps that could be taken to raise levels of understanding among policymakers, the judiciary, regulators, legal practitioners, risk-assessors, and other stakeholders regarding how human rights due diligence and legal liability interact.

36. The consultation highlighted the need for targeted education and outreach activities, while noting that some efforts would be cross-cutting. For instance, lawyers could be educated on business and human rights generally, and human rights due diligence and legal liability specifically, through the inclusion of such topics in law school curricula, continuing legal education and professional development courses, and practitioners' guidance.

37. In reaching out to business actors and their advocates (including directors, managers, employees, financial and risk officers, in-house counsel, and compliance officers), it is important to bear in mind that such actors often already engage in some human rights due diligence activities, just by a different name (e.g., "risk management and compliance"). This existing knowledge and expertise could be leveraged by showing how human rights risks can translate to legal, financial, and reputational risks to the company, while at the same time making it clear that human rights due diligence focuses on risks to people. The International Bar Association's Handbook for lawyers on business and human rights, which was developed as a practical guide for corporate lawyers, shows how this can be done. This project brought together business and human rights specialists and experienced corporate lawyers to ensure that the guidance had a strong basis in human rights while utilizing terminology and concepts that lawyers without a background in human rights could understand and relate to.[30] Professional associations and business networks clearly have a vital role in disseminating this knowhow.

38. Affected individuals and their advocates could benefit from greater understanding of the relationship between human rights due diligence and legal liability, so that failures of

[28] Italy, Legislative Decree 231/2001, art. 12.

[29] *See* A/HRC/32/19, Annex, Policy Objectives 11.4, 19.4.

[30] https://www.ibanet.org/Handbook-for-lawyers/Contents.aspx.

human rights due diligence can be challenged effectively. Where legal action has succeeded in clarifying the law with respect to human rights due diligence, it is important and beneficial that the relevant legal information, and lessons learned, are disseminated widely.

39. It is also important to reach out to independent regulators and enforcers, including prosecutors, investigators, regulatory enforcers, independent auditing companies, and certification bodies. There is often a lack of a human rights-lens in these professionals' work; an understanding of how their work contributes to the protection and promotion of human rights standards has the potential to improve effectiveness, as well as improve morale and motivation. The development of targeted practical guidance is one good way of accomplishing this. For example, the Corporate Crimes Principles were created as a means of showing how law enforcement could realistically infuse business and human rights within their work.[31] Such guidance and other means of education can be promoted at meetings of professional associations in this space.

40. Reaching out to decision-makers, such as judges, domestic and regional courts, non-judicial mechanisms, and arbitrators, is also an important way of ensuring that the relationship between human rights due diligence and legal liability is clarified and operationalized. Judges often face cases where a company's exercise of human rights due diligence is relevant to deciding a case, but they might not look at the case in those terms. The more advocates frame cases in terms of human rights due diligence before domestic judicial and non-judicial mechanisms, as well as regional courts, the more decision-makers will begin making the connections between the concept and legal liability. In general, the development of robust, credible, and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts would be a useful way of reaching out to decision-makers.[32] Suitable trainings of judges would be particular useful; such trainings have been conducted by OECD national contact points in some instances.

41. Policymakers at the national, regional, and international levels are also important stakeholders to reach out to in order to promote a clearer link between human rights due diligence and legal liability. There is a recent push for stronger laws requiring companies to implement human rights due diligence activities (as evidenced by the French duty of vigilance law and various proposals elsewhere).[33] Civil society organizations and others campaigning for legal reforms should recognize and take advantage of the momentum in this field. Robust, evidence-based guidance will be particularly useful for States contemplating new laws and approaches regarding the relationship between human rights due diligence and legal liability. In this regard, the Accountability and Remedy Project Part I report can help policymakers develop realistic ways of implementing and incorporating the UNGPs.

IX. Concluding Remarks

42. **The UNGPs call on business enterprises to conduct human rights due diligence in order to meet their responsibility to respect human rights. Such diligence allows businesses to identify, prevent, mitigate, and account for how they address their adverse human rights impacts. The Guiding Principles further provide important guidance and standards for how human rights due diligence should be conducted.**

43. **While the responsibility of business enterprises to respect human rights (of which human rights due diligence is an integral part) is theoretically distinct from issues of legal liability, there are many ways in which the two concepts can interact in practice.**

[31] http://www.commercecrimehumanrights.org/.

[32] A/HRC/32/19, Annex, Policy Objectives 3.4, 14.4.

[33] *See supra* Part 3.

44. **During the Geneva consultation, participants discussed several strategies that States could adopt to articulate this connection more clearly and to encourage greater use of human rights due diligence. These included:**

- **Mandating human rights due diligence activities under threat of legal liability;**
- **Evaluating the standard of care in negligence claims by reference to human rights due diligence standards;**
- **Permitting a human rights due diligence defense to certain offenses in appropriate cases;**
- **Considering the extent to which human rights due diligence was conducted when evaluating claims based upon theories of secondary liability; and**
- **Taking into account a company's exercise of human rights due diligence when determining the type and severity of sanctions and remedies if liability is established.**

45. **Whatever the approach taken, it is important than this is informed by clear policy aims. A key goal from the outset must be the encouragement of *meaningful* human rights due diligence by companies in the spirit of the UNGPs. However, in reaching for this goal, States should be careful to guard against unintended consequences of legal interventions; in order to avoid recourse to superficial, "check box" diligence approaches, a balance must be struck between legal certainty and providing businesses with flexibility in how they design their human rights due diligence processes.**

46. **These policy aims will not be achieved, however, if legislators responsible for the design of legal regimes, and lawyers and judges responsible for interpreting them, are not familiar with the content of the UNGPs, and specifically what the corporate responsibility to respect entails in practice. The consultation identified a wide range of professionals and stakeholders whose work touches on human rights due diligence in various ways, whether through the design of legal regimes, or in providing advisory services to companies (e.g. with respect to the management of risk), or in holding companies to account. These are key actors in the complex web of legal and regulatory initiatives relevant to corporate respect for human rights, and their importance in ensuring that human rights due diligence is taken seriously and implemented properly by companies should not be overlooked.**

Annex I

Relevant Policy Objectives From Accountability and Remedy Project Part I

This annex reproduces sections from the Accountability and Remedy Project Part I report (A/HRC/32/19) discussing human rights due diligence.

Policy objective 3: The principles for assessing corporate liability under domestic public law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

3.1 Domestic public law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

3.2 Domestic public law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

3.3 Domestic public law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

3.4 Enforcement agencies and judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Policy objective 14: The principles for assessing corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

14.1 Domestic private law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

14.2 Domestic private law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

14.3 Domestic private law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

14.4 Judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Annex II

Consultation Agenda

Palais des Nations, Room XXIII

5-6 October 2017

DAY 1:
Thursday, 5 October 2017

10:00 – 10:15 Introduction

Formal welcome and quick walk-through of agenda.

Led by:

Lene Wendland (OHCHR)

10:15 – 11:30 Session 1: General Review of the Accountability and Remedy Project and Recent Initiatives by Stakeholders

After quickly recapping ARP I and providing updates on ARP II, the floor will be opened to participants so they can share any initiatives undertaken to promote or implement the recommendations of ARP I.

Open discussion, moderated by:

Lene Wendland (OHCHR)

11:30 – 13:00 Session 2: Deconstructing Human Rights Due Diligence and its Relation to Corporate Liability

This panel discussion will break down the relationship between due diligence and legal liability to clarify what the nature and scope of this relationship is and the different ways that it can be legally expressed.

Panel discussion, moderated by:

Gerald Pachoud (Pluto & Associates)

Panelists:

Jennifer Zerk (Legal consultant, OHCHR Accountability & Remedy Project)

Rachel Davis (Shift)

Rae Lindsay (Clifford Chance)

Jonathan Kaufman (Advocates for Community Alternatives)

13:00 – 15:00 *Break for Lunch*

15:00 – 16:30 Session 3: Legal Regimes Requiring Companies to Carry Out Human Rights Due Diligence

This session will explore the range of laws that exist or are currently being proposed, how they work in practice, and the pros and cons of different regimes.

Panel discussion, moderated by:

Sarah McGrath (ICAR)

Panelists:

Jane Ellis (IBA)

Elise Groulx-Diggs (Doughty Street Chambers)

Esteban Mezzano (Nestlé)

Julia Lear (International Labour Organization)

16:30 – 18:00 Session 4: Human Rights Due Diligence and Claims of Negligence

This session will explore the relationship between human rights due diligence and claims of negligence with a particular focus on the extent to which courts have thus far explicitly referred to or drawn from UNGP guidance on human rights due diligence in their analysis of whether the relevant standard of care was met by the defendant company in question. Panelists and participants will be invited to reflect on what could be done to promote greater awareness of human rights due diligence concepts by courts and judges and how to better "embed" human rights due diligence concepts into domestic negligence regimes.

Panel discussion, moderated by:

Margaret Wachenfeld (Themis Research)

Panelists:

Richard Meeran (Leigh Day)

Doug Cassel (Notre Dame Law School)

Anita Ramasastry (UN Working Group on Business and Human Rights)

Catie Shavin (Global Business Initiative on Human Rights)

DAY 2:
Friday, 6 October 2017

10:00 – 10:15 Recap of Day 1 and Agenda for Day 2

Led by:

Jennifer Zerk (Legal consultant, OHCHR ARP)

10:15 – 11:30 Session 5: Human Rights Due Diligence and Strict / Absolute Liability

This session will discuss when strict and absolute liability is appropriate, as well as what role, if any, due diligence should have in relation to these regimes.

Panel discussion, moderated by:

Humberto Cantú Rivera (Universidad de Monterrey)

Panelists:

Julianne Hughes-Jennett (Hogan Lovells International LLP)

Krishnendu Mukherjee (Doughty Street Chambers)

Sandra Cossart (Sherpa)

Elsa Savourey (Herbert Smith Freehills)

11:30 – 13:00 Session 6: The Role of Human Rights Due Diligence in Determinations of Sanctions and Remedies

This session will be devoted to how the outcomes of a remedy process should be affected by a company's exercise of due diligence.

Panel discussion, moderated by:

Carlos Lopez (International Commission of Jurists)

Panelists:

	Robert McCorquodale (British Institute of International and Comparative Law)
	Katherine Gallagher (Center for Constitutional Rights)
	Mike Congiu (Littler Mendelson)
	Maylis Souque (French NCP)
13:00 – 15:00	*Break for Lunch*
15:00 – 16:30	Session 7: Reaching out to Enforcement Agencies, Judicial Bodies, and Other Practitioners Regarding the Role of Human Rights Due Diligence in Determinations of Corporate Liability and Attendant Penalties
	This session will be devoted to figuring out how to best promote what was learned during the consultation to enforcement agencies, judicial bodies, and other practitioners who must decide how the existence of human rights due diligence relates to legal liability. It will be aimed at converting the substantive knowledge gleaned from the earlier sessions, and from the conclusions of ARP I, into practical action.
	Open discussion, with introductory remarks by:
	Mark Taylor (FAFO)
	Jennifer Zerk (Legal consultant, OHCHR Accountability & Remedy Project)
16:30 – 17:40	Session 8: Promoting policy coherence in national, regional, and international initiatives
	This session will discuss the current processes and initiatives that could benefit from increased clarity regarding the relationship between human rights due diligence and corporate liability, and explore how to engage with the policy-makers behind these initiatives.
	Open discussion, with introductory remarks moderated by:
	Christopher Schuller (German Institute for Human Rights)
	Discussants:
	Gabriela Quijano (Amnesty International)
	Paul Noll (Confederation of German Employers' Associations)
17:40 – 18:00	Closing Remarks
	Led by:
	Lene Wendland (OHCHR)